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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARREN NOBLE, individually, and on behalf of Decedent, DYLAN NOBLE, as Successor-in-Interest to the Estate of Dylan Noble,

Plaintiff,

v.

CITY OF FRESNO, and the CITY OF FRESNO POLICE DEPARTMENT, RAYMOND CAMACHO, ROBERT CHAVEZ, and DOES 1 through 50,

Defendants.

Case No. 1:16-cv-01690 DAD-BAM

ORDER GRANTING PLAINTIFF’S MOTION TO COMPEL IN PART AND ORDERING PRODUCTION OF THE UNREDACTED INDEPENDENT AUDIT REPORT PRODUCED PURSUANT TO THE PROTECTIVE ORDER

(Doc. 29)

VERONICA NELSON, individually, and on behalf of Decedent, DYLAN NOBLE

Plaintiff,

v.

CITY OF FRESNO, and the CITY OF FRESNO POLICE DEPARTMENT, RAYMOND CAMACHO, ROBERT CHAVEZ, and DOES 1 through 50,

Defendants.

I. INTRODUCTION

Currently before the Court is Plaintiff Veronica Nelson’s (“Plaintiff”) Motion to Compel Defendant City of Fresno (“Defendant” or “the City”) to produce an unredacted version of the City of Fresno’s Office of Independent Review investigative Audit Report of the Dylan Noble

1 shooting. (Doc. 51). On March 5, 2018, Defendant filed an opposition to the Motion to which
2 Plaintiff filed a reply on March 9, 2018. (Docs. 51, 52). The Court heard oral argument on
3 March 16, 2018. Counsel Warren Paboojian and Stuart Chandler appeared in person on behalf of
4 Plaintiff. Counsel Lynn Carpenter appeared by telephone on behalf of Defendant. For the
5 reasons set forth below and on the record at the hearing held on March 16, 2018, Plaintiff's
6 Motion to Compel is GRANTED in part.

7 **II. RELEVANT BACKGROUND¹**

8 In 2009, the City of Fresno created the Office of Independent Review, in part, to audit
9 officer involved shooting investigations completed by the Internal Affairs division ("IA") of the
10 Fresno Police Department ("FPD"). (Doc. 50 at Ex. 5, pg. 4). The Office of Independent Review
11 ("OIR") provides quarterly reports which are posted on the City's website indicating the outcome
12 of the cases reviewed. In 2016, police auditor, Richard Rasmussen drafted a quarterly report
13 showing a "summary of all complaints submitted to the FPD during the fourth quarter of 2016."
14 (Doc. 50 at Ex. 6, pg 2). Regarding the investigation of the underlying shooting of Dylan
15 Noble—case 16-0051—the 2016 Quarterly summary concluded that the incident was "Not
16 Within Policy." (Doc. 50 at Ex. 6, pg 2).

17 The complete version of the OIR Audit Report, not available on the City's website,
18 contains opinions and conclusions of the auditor, Mr. Rasmussen, about whether the officer's
19 conduct violated the policies of the FPD in the shooting of Dylan Noble. During discovery,
20 Plaintiff served requests for production seeking a final version of Mr. Rasmussen's complete
21 Audit Report and the related file. After initially refusing production, the City produced a redacted
22 version of the relevant Audit Report. The analysis, conclusions and recommendations section,
23 approximately three full pages, was redacted from the report, leaving a summary of the IA report
24 that Plaintiff argues was already in her possession. The entire report was marked confidential and
25 therefore subject to the stipulated protective order entered earlier in this case. (Doc. 43).

26 As a result of the redactions to the OIR Audit Report, Plaintiff's counsel requested a status
27

28 ¹ The facts of this case are well known to the parties and the Court need not repeat them here.

1 conference with the Court. At the status conference on February 21, 2018, Plaintiff argued that
2 the City was improperly withholding the unredacted version of the OIR on the basis of the official
3 information and deliberative process privileges. (Doc. 48). The Court attempted to resolve the
4 discovery dispute informally, but Defendant City, however, would not agree to an informal
5 resolution of the disputed issues. The Court allowed the parties to brief the issue of privilege in a
6 formal motion to compel and ordered Defendant to submit the redacted and unredacted versions
7 of the OIR Audit Report for *in camera* review. (Doc. 48).

8 **III. DISPUTED DISCOVERY REQUESTS**

9 Plaintiff's formal motion to compel is currently pending before the Court. As detailed in
10 the motion, Plaintiff seeks (1) an unredacted version of the City of Fresno's Office of
11 Independent Review investigative Audit Report pertaining to the Dylan Noble shooting; and (2) a
12 list of the documents relied on by the OIR in drafting the Audit Report and/or the entire file
13 underlying the OIR. Plaintiff's specific requests for production are as follows:

14 Request for Production No. 158 seeks "a true and correct copy of the final Investigative
15 Report of the City of Fresno's office of Independent Review regarding the June 25, 2016 Dylan
16 Noble 'Officer Involved Shooting,' referenced on the City of Fresno Office of Independent
17 Review Website as 'IA PRO CASE #16-0051.'"

18 Request for Production No. 159 seeks "a true and correct copy of the entire file of the City
19 of Fresno's Office of Independent Review regarding the Dylan Noble shooting that took place on
20 June 25, 2016."

21 (Doc. 50 at 7-9).

22 **IV. PARTIES' ARGUMENTS**

23 As a general matter, Plaintiff first argues that Defendant's refusal to produce the OIR
24 Audit Report is contrary to the express purpose of the OIR and the independent audit process.
25 According to Plaintiff, the City of Fresno established the Office of Independent Review to help
26 "increase the level of transparency for the Police Department." (Doc. 50 at 5). In Plaintiff's
27 view, the City's efforts to shield the OIR Audit Report from discovery is not based on valid
28 principles of discovery, but an attempt to hide the results of an independent audit that was critical

1 of the FPD.

2 With respect to the specific discovery requests, Plaintiff argues that the unredacted version
3 of the OIR Audit Report should be produced outside of the protective order because Defendant
4 has not validly asserted the official information and deliberative process privileges in response to
5 Plaintiff's RFPs, and therefore, the Court should deem the privileges waived without an *in*
6 *camera* review. Plaintiff states that Defendant failed to submit a timely supporting declaration
7 from a responsible official within their agency at the time of the City's objection to production.
8 (Doc. 50 at 8). Plaintiff also contends that because the "analysis and opinions" of the OIR are
9 neither predecisional nor deliberative, that information is not subject to privilege protections.
10 (Doc. 50 at 8-9). Moreover, Plaintiff asserts that her "need for the material is substantial" and as
11 a result her interests as a civil-rights litigant outweighs any governmental interest in maintaining
12 the secrecy of any deliberative or official process. Finally, with respect to the file underlying the
13 Audit Report, Plaintiff argues that the City should be ordered to specifically identify what
14 documents were sent to the OIR.

15 Defendant argues that Plaintiff is not entitled to an unredacted Audit Report because the
16 "analysis and recommendations" section of the Audit Report is a privileged "official record"
17 protected from disclosure. (Doc. 51 at 5). Specifically, Defendant argues that the results of the
18 independent audit "are of vital significance to the City's ability to obtain independent analysis of
19 its own investigations to further develop proper remedial actions when needed, and assess the
20 viability of its current policies." (Doc. 51 at 5). Defendant further argues that production, even
21 under a protective order, would have a chilling effect on the incentive to pursue an independent
22 analysis.

23 In support of this argument, Defendant submits the declaration from Robert Nevarez, a
24 Deputy Chief in the Fresno Police Department. *See* Declaration of Robert Nevarez ("Nevarez
25 Decl."), Doc. 51-1. In his declaration, Deputy Nevarez states that he has personally reviewed the
26 unredacted OIR Audit Report, Internal Affairs Case Number 2016-0051. Nevarez Decl. ¶ 16.
27 According to Deputy Nevarez, public dissemination of the Audit Report would implicate the
28 privacy rights of the involved officers, other third party witnesses, and witness officers. Nevarez

1 Decl. ¶ 13. He states that the subjective opinions are part of the deliberative process and that
2 disclosure would have a chilling effect on forthright opinions and recommendations and the
3 ability to conduct self-critical analysis. Nevarez Dec. ¶¶ 14, 16.

4 **V. RELEVANT LAW**

5 **A. Official Information Privilege**

6 Federal common law also recognizes a qualified privilege for official information. *Kerr v.*
7 *U.S. Dist. Ct. for the N. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975). In determining what
8 level of protection should be afforded by this privilege, courts conduct a case by case balancing
9 analysis, in which the interests of the party seeking discovery are weighed against the interests of
10 the governmental entity asserting the privilege. *Soto v. City of Concord*, 162 F.R.D. 603, 613-14
11 (N.D. Cal. 1995); *see also Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033-34 (9th Cir.1990);
12 *Kelly v. City of San Jose*, 114 F.R.D. 653, 660 (N.D. Cal. 1987); *Miller v. Pancucci*, 141 F.R.D.
13 292, 300 (C.D. Cal. 1992); *Hampton v. City of San Diego*, 147 F.R.D. 227, 230-31 (S.D. Cal.
14 1993).

15 However, before a court will engage in this balancing of interests, the party asserting the
16 privilege must properly invoke the privilege by making a “substantial threshold showing.” *Kelly*,
17 114 F.R.D. at 669. In order to fulfill the threshold requirement, the party asserting the privilege
18 must submit a declaration or affidavit from a responsible official with personal knowledge of the
19 matters to be attested to in the affidavit. *Id.* The affidavit must include: “(1) an affirmation that
20 the agency generated or collected the material in issue and has maintained its confidentiality; (2) a
21 statement that the official has personally reviewed the material in question; (3) a specific
22 identification of the governmental or privacy interests that would be threatened by disclosure of
23 the material to plaintiff and/or his lawyer; (4) a description of how disclosure subject to a
24 carefully crafted protective order would create a substantial risk of harm to significant
25 governmental or privacy interests, and (5) a projection of how much harm would be done to the
26 threatened interests if disclosure were made.” *Id.* at 670; *see also Chism v. Cnty. of San*
27 *Bernardino*, 159 F.R.D. 531, 533 (C.D. Cal. 1994); *Hampton*, 147 F.R.D. at 230-31; *Miller*, 141
28 F.R.D. at 301. A strong affidavit would also describe how the plaintiff could acquire information

1 of equivalent value from other sources without undue economic burden. *Kelly*, 114 F.R.D. at 670.

2 If the court concludes that a defendant's submissions are not sufficient to meet the
3 threshold burden, it will order disclosure of the documents in issue. If a defendant meets the
4 threshold requirements, the court will order an in camera review of the material and balance each
5 party's interests. *Id.* at 671; *Chism*, 159 F.R.D. at 533-34; *Hampton*, 147 F.R.D. at 231; *Miller*,
6 141 F.R.D. at 301.

7 **B. Deliberative Process Privilege**

8 The deliberative process privilege covers "documents reflecting advisory opinions,
9 recommendations and deliberations comprising part of a process by which governmental
10 decisions and policies are formulated." *Dep't. of Interior v. Klamath Water Users Protective*
11 *Ass'n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001) (quoting *N.L.R.B. v. Sears,*
12 *Roebuck & Co.*, 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)); see also *F.T.C. v.*
13 *Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). "The deliberative process privilege
14 rests on the obvious realization that officials will not communicate candidly among themselves if
15 each remark is a potential item of discovery and front page news, and its object is to enhance the
16 quality of agency decisions, by protecting open and frank discussion among those who make
17 them within the Government." *Id.* at 8-9 (internal citations and quotations omitted). The Supreme
18 Court has expressly recognized the privilege with respect to the decision-making processes of
19 government agencies. *North Pacifica, LLC*, 274 F. Supp. 2d at 1121 (citing *N.L.R.B.*, 421 U.S. at
20 148-53)).

21 "A document must meet two requirements for the deliberative process privilege to apply.
22 First, the document must be predecisional—it must have been generated before the adoption of an
23 agency's policy or decision." *F.T.C.*, 742 F.2d at 1156. "Second, the document must be
24 deliberative in nature, containing opinions, recommendations, or advice about agency policies."
25 *Id.* "Purely factual material that does not reflect deliberative processes is not protected"; however,
26 factual material that "is so interwoven with the deliberative material that it is not severable" is
27 protected. *Id.*; see also *Sanchez v. Johnson*, No. C-00-1593 CW (JCS), 2001 U.S. Dist. LEXIS
28 25233, 2001 WL 1870308, at *5 (N.D. Cal. Nov. 19, 2001) ("[T]he fact/opinion distinction

1 should not be applied mechanically. Rather, the relevant inquiry is whether ‘revealing the
2 information exposes the deliberative process.’”). The burden of establishing the privilege is on the
3 party asserting it. *North Pacifica, LLC*, 274 F. Supp. 2d at 1122.

4 However, the deliberative process privilege is a qualified one. *F.T.C.*, 742 F.2d at 1156.
5 Thus, even if the privilege is established, a “litigant may obtain deliberative materials if his or her
6 need for the materials and the need for accurate fact-finding override the government's interest in
7 non-disclosure.” *Id.*; *see also North Pacifica, LLC*, 274 F. Supp. 2d at 1122. “Among the factors
8 to be considered in making this determination are: 1) the relevance of the evidence; 2) the
9 availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to
10 which disclosure would hinder frank and independent discussion regarding contemplated policies
11 and decisions.” *Id.* Other factors that a court may consider include: 5) the interest of the litigant,
12 and ultimately society, in accurate judicial fact finding, 6) the seriousness of the litigation and the
13 issues involved, 7) the presence of issues concerning alleged governmental misconduct, and 8)
14 the federal interest in the enforcement of federal law. *North Pacifica, LLC*, 274 F. Supp. 2d at
15 1122 (*citing United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989)).

16 **VI. ANALYSIS**

17 **A. Whether the Court Should Compel the Informal Resolution Process**

18 In granting the parties’ permission to file a formal motion to compel, the Court ordered
19 Defendant to address why the informal discovery resolution process should not be compelled
20 given the explicit language in the stipulated protective order stating that “[t]he parties will follow
21 the Court’s informal discovery dispute resolution process and procedures for the Court’s
22 determination regarding the confidential status of documents.” (Doc. 43 at 11 para 9.4). Prior to
23 the instant motion, the parties engaged in a lengthy discovery dispute that resulted in the entry of
24 a stipulated protective order. (Doc. 42, 43). Sections 9.3 and 9.4 of that stipulated protective
25 order detail the procedures for future discovery requests.

26 In Section “9.3 Future Discovery,” the parties stipulated that “with regard to future
27 discovery requests, if the parties cannot agree in writing that the producing Party has a right to
28 withhold a document...the producing party may provide the documents subject to the dispute the

1 requesting party marked clearly as CONFIDENTIAL” and “the receiving Party shall treat said
2 documents or materials as “CONFIDENTIAL” and subject to this Protective Order until
3 completion of the Resolution Process. (Doc. 43 at 10).

4 In Section “9.4 Resolution Process,” the parties agreed that if they could not reach an
5 agreement as to whether documents should be treated as confidential the “Parties will...follow the
6 Court’s informal discovery dispute resolution process and procedures for the Court’s
7 determination regarding the confidential status of the documents or materials.” (Doc. 43 at 11).

8 In objecting to the informal resolution process for the purposes of the instant motion, the
9 City argues that by entering into the stipulated protective order, it never intended to waive its
10 right “to formal resolution and briefing, if the informal dispute procedure would not adequately
11 preserve the record.” (Doc. 51 at 13). The City also argues that because the Audit Report at issue
12 here was not delineated in the protective order, disagreements regarding the confidentiality of this
13 document are therefore not subject to the terms of the protective order and the resulting informal
14 resolution process.

15 Defendant’s arguments are unpersuasive. Participation in the Court’s informal resolution
16 process does not deprive Defendant or any party of their right to object to discovery or assert
17 privilege protections. Instead, the informal discovery resolution process is designed to narrow
18 issues, avoid litigation costs, and achieve a quicker resolution for the parties than a formal noticed
19 motion. Indeed, the need to utilize the informal process in this case was predicated in large part
20 on the parties’ earlier protracted discovery dispute.

21 The stipulated protective order as agreed to by the parties lays out the procedure to be
22 used for “future discovery” disputes. By the terms of the protective order, the parties intended to
23 be bound by the informal discovery process going forward in this case. To the extent that
24 Defendant argues that the Audit Report is not subject to the stipulated protective order, this
25 argument is equally unpersuasive. The documents included as “protected material” under section
26 4.1 include “accident review board, and internal investigations relating to Defendant officers.”
27 (Doc. 43 at 3). While not explicitly identified in the protective order, the parties knew that an
28 issue of confidentiality would arise as to the Audit Report; and the nature of the Audit Report is

1 certainly similar enough to items detailed in the protective order to conclude that the treatment of
2 all of these items should be similar.

3 Ultimately, Defendant's efforts to evade the informal resolution process here are not well
4 taken. The Court provides the abbreviated discovery dispute process to save time and resources.
5 This case has already suffered significant delay, which forced the parties to seek lengthy
6 continuances of the trial. (Doc. 49). The parties have already been informed that going forward,
7 the Court will not modify the scheduling order absent a detailed showing of good cause, which
8 will be subject to this Court's discretion. Fed. R. Civ. P. 16(b). The clock is ticking, and future
9 discovery disputes will be handled as a part of the Court's informal resolution process as
10 stipulated in the protective order, and all such disputes will be on the record.

11 **B. Whether Defendant's Declaration is Sufficient**

12 **i. Timeliness of Defendant's Declaration**

13 In challenging Defendant's assertions of privilege, Plaintiff first argues that Defendant
14 waived the right to assert privileges here by failing to submit a timely declaration from an agency
15 official at the time of the objection to production. (Doc. 50 at 8). Defendant's opposition does
16 not specifically address the issue of timeliness, but generally asserts that Deputy Nevarez's
17 declaration satisfies the threshold requirements.

18 To make a substantial threshold showing of a qualified privilege, a "party must submit, at
19 the time it files and serves its response to the discovery request, a declaration or affidavit, under
20 oath and penalty of perjury, from a responsible official within the agency who has personal
21 knowledge of the principal matters to be attested to in the affidavit or declaration." *Kelly*, 114
22 F.R.D. at 669

23 Here, the invocation of the official information and deliberative process privileges appears
24 to be untimely given that Defendant did not submit a supporting affidavit until the filing of the
25 Opposition to the motion to compel. *Cf. Miller v. Pancucci*, 141 F.R.D. 292, 300 (C.D. Cal.
26 1992) (as to the "official information" privilege, requiring submission of affidavit from the head
27 of the department at the time responses to the discovery requests are served); *Centeno v. City of*
28 *Fresno*, No. 1:16-CV-653 DAD SAB, 2016 U.S. Dist. LEXIS 180013, 2016 WL 7491634, at *13

1 (E.D. Cal. Dec. 29, 2016) (requiring that the declaration or affidavit from a responsible official
2 within the agency be submitted at the time a party files and serves its response to a discovery
3 request); *Nehad v. Browder*, 2016 U.S. Dist. LEXIS 62594, 2016 WL 2745411, at *6 (S.D. Cal.
4 May 10, 2016) (same). However, Courts have been hesitant to apply an automatic privilege
5 waiver for procedural failures during discovery. *See Burlington Northern & Santa Fe Ry. Co. v.*
6 *U.S. Dist. Ct. for the Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (the Ninth Circuit has
7 “reject[ed] a per se waiver rule that deems a privilege waived if a privilege log is not produced
8 within Rule 34’s 30-day time limit.”); *Perez v. United States*, No. 13cv1417-WQH-BGS, 2016
9 U.S. Dist. LEXIS 15887, 2016 WL 499025 at *3 (S.D. Cal. Feb. 9, 2016) (“Defendants failure to
10 provide Plaintiffs with a declaration in support of the official information privilege or deliberative
11 process privilege at the time they provided the privilege log did not result in an automatic waiver
12 of either privilege.”).

13 Indeed, in a similar case, this Court declined to apply an automatic waiver to Defendants’
14 failure to provide Plaintiff with a declaration in support of the official information privilege or
15 deliberative process privilege at the time Defendant initially objected to discovery because of the
16 important underlying policy concerns. *See Macias v. City of Clovis*, No. 1:13-CV-01819-BAM,
17 2015 U.S. Dist. LEXIS 156106, 2015 WL 7282841, at **3-4 (E.D. Cal. Nov. 18, 2015).

18 Like in *Macias*, given the policy concerns implicated here, the Court will consider the
19 merits of Defendant’s privilege objections even though these objections are supported by an
20 untimely affidavit. *Id.*; *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (noting that discovery rules
21 are to be accorded a broad and liberal treatment); *accord Martin v. Reynolds Metals Corp.*, 297
22 F.2d 49, 56 (9th Cir. 1961); *see also Aguilar v. County of Fresno*, 2009 U.S. Dist. LEXIS 107946,
23 11-13, 2009 WL 3617984 (E.D. Cal. Oct. 29, 2009) (refusing to find waiver of the privacy
24 privilege where Plaintiff failed to raise a timely objection in their initial discovery response).
25 Consequently, the Court finds that under the circumstances, Defendant did not automatically
26 waive its right to assert privilege objections to the discovery at issue here.

27 **ii. Sufficiency of Defendant’s Head of the Department**

28 Plaintiff also challenges Deputy Nevarez’s declaration as insufficient to satisfy the

1 requirement that the assertion of privilege be supported by a sworn declaration from the relevant
2 department head. Plaintiff explains that as a member of the FPD, Deputy Nevarez is not the head
3 of the relevant agency—the Office of Independent Review. However, at least one court has noted
4 that, when interpreting the sufficiency of the declaration in support of the deliberative process
5 privilege, it would be “counterproductive to read ‘head of the department’ in the narrowest
6 possible way[.]” See *Perez*, 2016 WL 499025 at *3 (citing *Landry v. F.D.I.C.*, 204 F.3d 1125,
7 1135, 340 U.S. App. D.C. 237 (D.C. Cir. 2000) (citations omitted). The Court in *Perez* stated:

8 The “[agency head] procedural requirements are designed to ensure that the
9 privileges are presented in a deliberate, considered, and reasonably specific
10 manner” *Id.* (declining to require that assertion by the head of the overall
11 department or agency is necessary to invoke the deliberative process privilege, and
12 citing cases supporting that conclusion). This helps to ensure that the privilege is
13 invoked by an informed executive official of sufficient authority and responsibility
14 to warrant the court relying on his or her judgment. *National Lawyers Guild v.*
15 *Attorney General*, 96 F.R.D. 390, 396 (S.D.N.Y 1982).

16 See *Perez*, 2016 WL 499025 at *3.

17 According to Deputy Nevarez’s declaration, his responsibilities include oversight of the
18 Administrative Services Division which includes “Internal Affairs, Personnel, Audits and
19 Inspections Policy and Procedure, Regional Training Center, Fiscal Affairs, and Police Civil
20 Litigation.” Nevarez Decl. ¶ 2. Given the scope of Deputy Nevarez’s responsibilities, he is an
21 appropriate person to author the declaration for the purposes of the privileges alleged here. It is
22 the City’s privilege, and while the FPD did not create the Audit Report, Deputy Nevarez is the
23 head of the department with control over the requested information. *Miller*, 141 F.R.D. at 300
24 (declaration must be from the head of the department which has control over the matter.) For that
25 reason, he can adequately opine on the impact of potential disclosure threatened here and he has
26 sufficient authority and knowledge to assure the Court that the privilege is being presented
27 thoughtfully and specifically.

28 **C. Whether the Invoked Privileges Preclude Disclosure**

i. Deliberative Process

The Court next considers Defendant’s contention that the OIR Audit Report is protected

1 by the deliberative process privilege. Courts have held that the deliberative process privilege is
2 “inappropriate for use in civil rights cases against police departments.” *Soto*, 162 F.R.D. at 612;
3 *see also e.g., Nehad v. Browder*, 2016 U.S. Dist. LEXIS 62594, 2016 WL 2745411, at *6 (S.D.
4 Cal. May 10, 2016); *Medina v. County of San Diego*, 2014 WL 4793026, at *7 (S.D. Cal. Sept.
5 25, 2014). The deliberative process privilege should “be invoked only in the context of
6 communications designed to directly contribute to the formulation of important public policy,”
7 and thus “would offer no protection at all to most of the kinds of information police departments
8 routinely generate.” *Id.* Courts thus reject use of the deliberative process privilege as applied to
9 internal affairs investigations, as well as records of witness or police officer statements because
10 they are of the type that are routinely generated. *Id.* (the application of the deliberative process
11 privilege is not appropriate in civil rights cases against police departments). The Court agrees
12 with this reasoning that the deliberative process privilege is inapplicable to the production of OIR
13 Audit Report.

14 Here, while Defendant argues that the Auditor’s subjective analysis and recommendations
15 are crucial to the deliberative process, the City, who bears the burden of establishing the
16 deliberative process privilege, does not identify which policy or decision relates to the Audit
17 Report. Defendant has not indicated how the Audit Report directly contributes to the formulation
18 of policy nor how the FPD intends to use the recommendations included in the Audit Report.
19 Rather, Deputy Nevarez’s declaration warns against disclosure due in part to privacy rights of the
20 involved officers and witnesses, and the potential that disclosure could “expose the City to
21 additional fiscal losses.” Nevarez Decl. ¶ 11, 13, 15. These concerns are insufficient to meet the
22 threshold test for invoking the deliberative process privilege.

23 The comments by Deputy Nevarez on the potential chilling effect posed by disclosure is
24 better understood as a fear that the ability for the police department to be self-critical would be
25 curtailed if discovery were allowed. The self-critical analysis privilege, however, is not
26 recognized by the Ninth Circuit as a valid bar to disclosure. *Dowling v. American Hawaii*
27 *Cruises*, 971 F.2d 423, 426 (9th Cir. 1992) (Ninth Circuit found that the self-critical analysis did
28 not protect routine internal corporate reviews of matters related to safety concerns). Thus, based

1 on the information before the Court, Defendant has failed to establish that the deliberative process
2 privilege applies to the OIR Audit Report.²

3 **ii. Official Information Privilege**

4 In a prior ruling on whether the official information privilege barred disclosure of internal
5 affairs and policy information in this case, this Court balanced the public and governmental
6 interests in disclosing relevant officer personnel files, police department training materials, policies,
7 procedures, and the IA investigations and concluded that the balance tipped rather clearly in favor of
8 disclosure of that information subject to a protective order. *Noble v. City of Fresno*, 2017 WL
9 5665850, at **10-11 (E.D. Cal. Nov. 27, 2017).

10 Here, Deputy Nevarez’s declaration explains that the OIR Audit Report is an evaluation of the
11 City’s “investigation adequacy and thoroughness,” as well as a review of “the quality and accuracy of
12 the investigative report.” Nevarez Decl. ¶ 7. Put more simply, the OIR Audit Report at issue here is
13 merely an investigation of an investigation. This secondary investigation, conducted by an outside
14 auditor, thus reviews the results of Internal Affairs investigations in comparison to previously
15 established police training materials, department policies, and police practices. The nature of the OIR
16 Audit Report is therefore analogous to the categories of training, policy, and IA investigation
17 materials already ordered produced by this Court. *Noble*, 2017 WL 5665850 at * 12. The official
18 information privilege serves an important purpose, but it does not automatically apply to all evaluative
19 portions of internal affairs type reports. As the *Kelly* court explained, courts which view evaluative
20 comments and opinions in internal affairs reviews as being protected by a near absolute privilege
21 “make a mockery of the whole concept of balancing.” *Kelly*, 114 F.R.D. at 664; *Carter v. Carlsbad*,
22 No. 10CV1072-IEG BLM, 2011 WL 669227, at *4 (S.D. Cal. Feb. 15, 2011). Given the prior ruling
23 in this case, and the general judicial preference for disclosure of relevant evidence in the civil rights
24 cases, the Court cannot justify withholding the unredacted version of the OIR from Plaintiff on any

25 ² At oral argument, Defendant re-emphasized its reliance of *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108
26 F.3d 1089, 1094 (9th Cir. 1997) for the proposition that Audit Report is predecisional and deliberative. *Maricopa* is
27 distinguishable because it was not a civil rights case, but rather a Freedom of Information case. Civil rights cases
28 have strong public policies of disclosure. Indeed, the Court in *Maricopa* rejected a similar argument that a memorandum is predecisional because it involved an ongoing audit process. “[W]e are required to reject the government's primary argument that a continuing process of agency self-examination is enough to render a document ‘predecisional.’” *Id.*

1 basis proffered by Defendant. Accordingly, Defendant will be ordered to produce the OIR Audit
2 Report in its entirety, subject to the limitations discussed below.

3 **D. Disclosure Shall Occur Subject to the Protective Order**

4 The Court has reviewed the unredacted version of the OIR Audit Report *in camera* and
5 finds that disclosure of the unredacted OIR Audit Report subject to the protective order already in
6 place will serve the interests of both parties in facilitating discovery, while also protecting the
7 government's interests.

8 The Court, however, declines Plaintiff's request to review the unredacted version of the
9 Audit Report and identify the portions of the OIR Audit Report that are factual in nature and
10 therefore subject to public disclosure. *In camera* review is not intended to shift the burden of
11 review of relevant documents from the parties to the Court. *Centeno*, 2016 WL 7491634, at *16.

12 **E. Whether Defendant Must Identify Documents Relied on by the OIR**

13 Finally, Plaintiff seeks the file provided to the OIR and/or a list of the documents relied
14 on by the OIR in evaluating the underlying incident. At oral argument, Plaintiff clarified her
15 position and suggested that some identification of the documents—either by Bates number or a
16 general description—would satisfy her discovery request and further serve the purpose of
17 expediting discovery related to depositions and documents about the OIR Audit Report.
18 Defendant objects to Plaintiff's request as unduly burdensome, in part, because Defendant has
19 already produced any and all items provided to the OIR. According to Defendant, the OIR relied
20 solely on the documents and materials of the investigating agency and those documents have been
21 turned over to Plaintiff. When pushed at the discovery hearing to provide further argument as to
22 why Plaintiff's request is unduly burdensome, Defendant did not identify any specific burden, and
23 but reiterated its stance that the City has already complied with its discovery obligations by
24 producing the documents.

25 Rule 1 of the Federal Rules of Civil Procedure stresses that the rules “should be construed
26 and administered to secure the just, speedy, and inexpensive determination of every action and
27 proceeding.” In light of the particular circumstances of this case, including this protracted
28 discovery dispute and the prior lengthy discovery dispute, the Court finds good cause to exercise

1 its discretion to authorize the requested discovery. The Court comes to this decision after careful
2 consideration of the filings; the minimal burden to Defendant, the recent continuance of discovery
3 and trial dates; and the general principles of just case management under Rule 1 of the Federal
4 Rules of Civil Procedure. The parties are ordered to meet and confer to determine the least
5 burdensome and cost efficient method of identifying the documents which were given to OIR for
6 the OIR to conduct its audit.

7 **VII. CONCLUSION AND ORDER**

8 Based on the arguments presented here and as stated on the record, IT IS HEREBY
9 ORDERED that:

- 10 1. Plaintiff's Motion to Compel the unredacted OIR Audit Report is GRANTED in
11 PART. Defendant is ordered to produce the unredacted version of the Audit Report
12 subject to the protective order previously entered in this case within seven (7) calendar
13 days of this Order,
- 14 2. Defendant shall identify the documents provided to OIR as discussed in this order; and
- 15 3. The original redacted and unredacted OIR Audit Report, submitted for in camera
16 review, shall be returned to Defendant. Defendant SHALL arrange to have the
17 documents picked up from Courtroom Deputy Harriet Herman within seven (7) days
18 of the Court's order.

19
20 IT IS SO ORDERED.

21 Dated: March 19, 2018

22 /s/ Barbara A. McAuliffe
23 UNITED STATES MAGISTRATE JUDGE
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